In The

Supreme Court of the United States

October Term, 1977

No. 77-123

LOCAL NO. 757 OF THE ICE CREAM DRIVERS AND EMPLOYEES UNION, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and EMANUEL PARISH, Individually and as Secretary-Treasurer of said Local,

Petitioners,

—against—

BARCLAY'S ICE CREAM CO., LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STANLEY M. BERMAN
Attorney for Petitioners
605 Third Avenue
New York, New York 10016
Tel. No. (212) 682-6077

Of Counsel:
COHEN, WEISS AND SIMON

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AUTHORITIES CITED

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Local No. 757 of the Ice Cream Drivers and Employees Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America (hereinafter "Local 757") and Emanuel Parish respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals of the State of New York entered in this proceeding.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York granting the motion of Respondent Barclay's Ice Cream Co., Ltd. (hereinafter "Barclay's") to remand to the Supreme Court of the State of New York, New York County, is reproduced as Appendix A. It has not been reported.

The opinion of the Supreme Court of the State of New York, New York County, Special Term, Part I, denying Barclay's motion for a preliminary

injunction is reproduced as Appendix B. It has not been reported.

The opinion of the Appellate Division of the New York Supreme Court, First Department, reversing the decision of Special Term and granting Barclay's motion for a preliminary injunction is reported at 51 A.D.2d 516, 378 N.Y.S.2d 395 (1st Dept. 1976), and at 91 LRRM 2828. It is reproduced as Appendix C. The order of the Appellate Division is reproduced as Appendix D.

The opinion of the New York Court of Appeals affirming the order of the Appellate Division is reported at 41 N.Y.2d 269, 392 N.Y.S.2d 278 (1977), and at 94 LRRM 2647 and 81 CCH Lab. Cas. ¶55,033. It is reproduced as Appendix E.

JURISDICTION

The Court of Appeals rendered its decision on February 10, 1977. That decision affirmed the order of the Appellate Division which was dated and entered on February 5, 1976. The order of the Court of Appeals denying Petitioners' motion for reargument was dated April 26, 1977, and is reproduced as Appendix F. The order of the Court of Appeals granting Petitioners' motion to amend the remittitur was dated June 9, 1977, and is reproduced as Appendix G. This Court has jurisdiction to review the decree in question under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Is the determination of the New York Court of Appeals which

affirmed the granting of a preliminary injunction in a labor dispute reviewable under 28 U.S.C. Section 1257(3), inasmuch as it finally determined that the action was not subject to federal preemption and that the grant of injunctive relief did not violate the Petitioners' rights under the First Amendment to the United States Constitution?

2. Do the courts of New York have jurisdiction, notwithstanding the doctrine of National Labor Relations Board preemption, to enjoin for reasons of state policy peaceful union picketing and handbilling where they have found that the purpose is to coerce a person engaged in commerce for the object of requiring it to cease doing business with its out-of-state manufacturers?

3. Assuming arguendo that such activities are neither protected nor prohibited by the Labor-Management Relations Act of 1947, as amended, are they nevertheless activities within an area preempted by Congress and not subject to regulation by state law?

4. In any event, does an absolute prohibition against such peaceful activities violate the union's rights guaranteed by the First Amendment to the United States Constitution?

CONSTITUTION AND STATUTES

The First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States; 28 U.S.C. §1257(3) (62 Stat. 929); and Section 8(b)(4)(B) of the Labor-Management Relations Act of 1947, as amended

(hereinafter "LMRA") (61 Stat. 141-142, 29 U.S.C. §158(b)(4)(B)) are set forth at Appendix H.

STATEMENT OF THE CASE

A. Statement Pursuant to Rule 23.1.(f).

The federal preemption and Constitutional questions were raised by Petitioners in argument (1) before the New York Supreme Court, Special Term, in opposition to Barclay's motion for a preliminary injunction; (2) before the Supreme Court, Appellate Division, in opposition to Barclay's appeal from the order of Special Term denying its motion for a preliminary injunction; (3) before the Court of Appeals in support of the Petitioners' appeal from the order of the Appellate Division reversing Special Term and granting Barclay's motion for a pre-

liminary injunction; and (4) before the Court of Appeals in support of the Petitioners' motion for reargument.

Special Term (R.8; App.3b)*, the Appellate Division (R.80 - R.81; App.3c-5c) and the Court of Appeals (App.5e-8e) specifically ruled against the Petitioners on the preemption questions. The Constitutional questions were not specifically mentioned in the courts' opinions. On June 9, 1977, the Court of Appeals granted the Petitioners' motion to amend the remittitur to certify that it had considered and passed upon the Constitutional questions, as follows:

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*Citations preceded by "R" refer to pages of the Record in the Court of Appeals. Citations preceded by "App." refer to pages of the appendices annexed to this petition.

> "On the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Whether the appellants' rights under the First Amendment to the Constitution of the United States were violated by the injunction pendente lite issued at the Appellate Division. The Court of Appeals considered that contention and found no such violation." App.2g.

B. Proceedings Below

Barclay's is an ice cream distributor engaged in interstate commerce. It commenced this action in the New York Supreme Court seeking a permanent injunction to restrain Local 757: (1) from peacefully picketing retail stores and distributing handbills to request the public not to purchase ice cream manufactured outside New York under labor standards lower than those enjoyed by members of Local 757 and distributed by

Barclay's; and (2) from advising stores of its intention to engage in such peaceful picketing and handbilling. The defendants (Petitioners here) are Local 757 and its Secretary-Treasurer.

The Petitioners removed the action to the United States District Court for the Southern District of New York which remanded to the State Court (App.1a-2a).

Barclay's then moved in Special Term of the New York Supreme Court for a preliminary injunction seeking the identical relief sought in the complaint (R.9 - R.17). The Petitioners contended that Special Term was preempted of jurisdiction which was exclusively with the National Labcr Relations Board ("NLRB"), because the acts complained of were arguably pro-

tected or prohibited by the LMRA. Petitioners also contended that their activities were protected by the First Amendment to the United States Constitution.

Special Term held that it was not preempted of jurisdiction, but found on the record before it that Barclay's was not entitled to a preliminary injunction because there were substantial issues of fact which could be resolved only upon a trial (App.3b-4b). It did not specifically rule upon the Constitutional questions. By order filed October 24, 1975, it denied the motion for a preliminary injunction and ordered an immediate trial (R.4 - R.6). Barclay's appealed to the Appellate Division, First Department, of the New York Supreme Court.

The Petitioners renewed their preemption and Constitutional arguments before the Appellate Division. The Appellate Division held that preemption did not apply and reversed the denial of the preliminary injunction without addressing the Constitutional issues (App.C). By order dated February 5, 1976, it granted a broad injunction including prohibitions against peaceful picketing and the distribution of literature advising of the intention to picket (App.3d-5d).

The Petitioners appealed to the Court of Appeals by permission of the Appellate Division (App.2e). The Court of Appeals, presuming that questions of fact were resolved in Barclay's favor (App.2e), found that the case was not within the exclusive jurisdiction of the

NLRB (App.7e) and affirmed the order of the Appellate Division (App.9e).

The Petitioners' motion for reargument was denied without opinion on April 26, 1977 (App.F). On June 9, 1977, the Court of Appeals certified that the Petitioners' First Amendment contentions were presented to it and were necessarily passed upon and that the Court had found no violation of the Petitioners' First Amendment rights (App.G).

C. Statement of Facts

Barclay's is engaged in interstate commerce. It distributes ice cream from its depot in New Jersey (R.26) to retail outlets in New York and New Jersey (R.24). The ice cream is manufactured by and obtained from Penn Dairies, Inc. of Lancaster, Pennsylvania

and Dairy Services of Ohio, Inc. of Coshocton, Ohio (R.33 - R.34).

Local 757 represents employees engaged in the manufacture of ice cream in the New York City area (App.3e). Local 757 sent letters to Pioneer Supermarkets on May 5 (R.41 - R.42), and September 11, 1975 (R.68). Pioneer is a chain of retail food stores selling ice cream and many other products at retail to the general public. The letters referred to Scotch Maid ice cream (R.41) which is manufactured by Dairy Services of Ohio. This product was described as being manufactured under sub-standard labor conditions (R.41 - R.42).

These letters, together with the enclosures which accompanied them, described Local 757's intention to picket peacefully at consumer entrances to

Pioneer stores and to distribute handbills to request the public not to purchase ice cream manufactured under substandard labor conditions. There is no allegation that picketing has taken place, and none has (R.65).

D. The Jurisdictional Rulings Below

1. The United States District Court

The Petitioners removed the action to the United States District Court for the Southern District of New York, upon the theory that the complaint alleged a secondary boycott in violation of Section 8(b)(4) of the LMRA, actionable in the district courts under Section 303, as amended (61 Stat. 158, 73 Stat. 545, 29 U.S.C. §187), notwithstanding the absence of a claim for damages.

The District Court found "no federal jurisdiction" because "... the complaint alleges only a consumer boycott..." citing NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760, 377 U.S. 58 (1964), the "Tree Fruits" case (App.1a-2a). It remanded to the New York Supreme Court (App.2a).

2. New York Supreme Court, Special Term

Following the District Court's remand, Barclay's argued before Special Term that inasmuch as the District Court had found no secondary boycott, the state courts were free to act (R.16).

The Petitioners contended that the District Court's decision meant just the opposite. It found that a Tree Fruits consumer boycott, protected under the

LMRA, was alleged. Therefore, the acts complained of were, at the very least, either arguably protected or prohibited under the LMRA, and both the state and federal courts were preempted of jurisdiction in favor of the NLRB.

Special Term incorrectly read the remand order as determinative that federal law had no role in this action and that the preemption doctrine was therefore inapplicable (App.3b).

3. The Appellate Division

The Appellate Division did not treat the order of remand as dispositive of the federal issues presented. It reached the preemption question, agreeing that if there was an "arguable question of jurisdiction" the NLRB would have exclusive jurisdiction (App.4c). It

escaped the consequences of this conclusion by declaring that in this case a "labor dispute" was not involved (App.4c-5c).

4. The Court of Appeals

The Court of Appeals, presuming questions of fact resolved in Barclay's favor (App.2e), adopted the Appellate Division's finding that Local 757's statements that Barclay's ice cream was manufactured under sub-standard labor conditions were "... without basis in the record." App.4e. It accepted as fact also: (1) that labor conditions at the plants of Barclay's manufacturers were determined under union contracts (App.4e); and (2) that Local 757's sole objective "... was 'to protect our members' jobs' -- i.e., by compelling Barclay's to purchase locally produced ice cream rather than that manufactured in Pennsylvania and

Ohio." App.4e-5e.

Having accepted the facts as above stated, the Court found that "... it cannot be disputed that the Union's contemplated activities would constitute an unlawful restraint of trade under our State law and public policy (Mayer Bros. Poultry Farms v. Meltzer, 274 App Div 169)." App.5e.

The Court then considered the question of NLRB preemption and stated that:

> "The resolution must turn on whether it may rationally be concluded that the conduct in question is activity conducted for the purpose and within the scope of recognized union objectives or whether it is conduct outside that scope although engaged in by the members of a labor union." App.6e-7e.

Having thus decided to resolve itself the NLRB's jurisdiction, rather than deferring to the NLRB in the first instance, the Court found that, "No legitimate objective of labor union activity is here involved" (App.7e), and concluded as follows:

> "The sole objective and consequence of the intended consumer boycott is by means of coercive economic pressure to force Barclay's to abandon its out-of-state suppliers and to turn exclusively to local sources. The imposition of such an embargo to promote the economic interest of members of the local union is an unlawful purpose contrary to the public policy of this State; as such it is not beyond the power of the courts to reach and to enjoin (cf. Linn v. United Plant Guard Workers, 383 U.S. 53, 59, supra)." (App.8e).

It is the Petitioners' primary position that the allegations and findings accepted by the Court of Appeals state a

clear violation of Section 8(b)(4)(ii)(B) of the LMRA, unless protected by the second proviso to Section 8(b)(4). Tree Fruits, supra; NLRB v. Servette, Inc., 377 U.S. 46 (1964). In either case, state law is preempted, and the injunction was improperly issued.

REASONS FOR GRANTING THE WRIT

The decline of job opportunities in heavily unionized urban centers is a matter of paramount concern to unions and their members.

This adverse trend, generated largely by severe economic competition in the labor market, is particularly notable in manufacturing. It has been accelerated by technological improvements in transportation and storage facilities. This dilemma for urban workers is aptly

illustrated in the present case. The ability to store and transport from distant manufacturing centers such a traditionally perishable commodity as ice cream is a recent development and a new threat to the job security of manufacturing employees in local market areas. The resultant conflicts between the interests of the workers and those of distant manufacturers and their distributors are inevitable. The present case focuses directly upon concerns and conflicts which will be of prime importance to the nation's economy for years to come.

It is essential to the national economy and to the uniform regulation of commerce that not only the parties to the present dispute but others who will of necessity be drawn into similar conflicts be subject to consistent guidelines and

regulation when seeking to advance their own interests. The decision below, based entirely upon considerations of a state's local policy, prevents this goal from being realized.

It is apparently now the law in New York that local courts can determine upon the basis of local policy which economic weapons unions may use in complex disputes involving citizens of four states and directly affecting commerce. In so doing, it has decided a federal question of substance in a way not in accord with applicable decisions of this court. Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252 (1964); cf. Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, ___ U.S. ___, 96 S.Ct. 2548 (1976).

If the New York decision is left standing, the courts of New Jersey, Pennsylvania and Ohio could decide the same or similar issues in accordance with their local policies, regardless of whether they conform to those of New York or of whether they or those of New York are in conflict with federal policy. It is essential that there be a prompt resolution of whether such complex and critical industrial controversies are to be subject to piecemeal regulation.

This case also raises the First Amendment issues which the Court found unnecessary to resolve in Tree Fruits (377 U.S. at 63) and Servette. New York, by enjoining a consumer boycott, has limited the rights of unions and their members to take their case to the public, even though the NLRB may not, under Tree

Fruits and Servette, do so. The extent of the free speech guarantee should not turn upon whether a litigant elects to pursue his remedies in a local court or in the NLRB. If local regulation of consumer boycotts is to be permitted, the permissible bounds of free speech and the extent to which it can be regulated must be uniformly defined.

The highest court of New York has finally determined the claims of the Petitioners under the LMRA and the Constitution. It has decided whether and to what extent the state courts may proceed with and determine questions of substance affecting commerce and freedom of speech. That determination conflicts with federal labor policy and should be reviewed by this Court.

ARGUMENT

I.

THIS COURT HAS JURISDICTION UNDER 28 U.S.C. §1257(3) TO REVIEW THE DETERMINATION OF THE NEW YORK COURT OF APPEALS

This Court may review under Section 1257,

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had...."

The decision of the Court of Appeals finally determined (1) the jurisdiction of the state courts to enjoin peaceful union picketing in a dispute affecting commerce; and (2) that such injunctions do not violate First Amendment rights. It is, therefore, a final determination reviewable under Section 1257, notwithstanding that it

affirmed only the authority of the state courts to grant a preliminary injunction. Local No. 438, Construction & General Laborers' Union, AFL-CIO v. S.J. Curry, 371 U.S. 542, 548 (1963). Accord, Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 482-487 (1975); American Radio Association, AFL-CIO v. Mobile Steamship Association, Inc., 419 U.S. 215, 217 fn.1 (1974); Organization for A Better Austin v. Keefe, 402 U.S. 415, 418 fn.1 (1971); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313 fn.5 (1968); Rosenblatt v. American Cyanamid Company, 86 S.Ct. 1 (Goldberg in Chambers, 1965).

The Local 438 case proceeded through the Georgia courts much as the present case did in the New York courts, and the same policy considerations regarding review are applicable to both cases. In

Local 438, non-unionized building contractors sought in a state court to enjoin peaceful union picketing at a construction site. The union argued in opposition to a temporary injunction application that its activities were within the exclusive jurisdiction of the NLRB. The trial court denied the application without opinion, and the contractors appealed. The Georgia Supreme Court reversed and authorized entry of the temporary injunction upon the ground that the picketing violated Georgia's right-to-work law.

This Court granted certiorari and stated:

> "Whether or not the Georgia courts have power to issue an injunction is a matter wholly separate from and independent of the merits of respondents' cause. The issue on the merits, namely the legality

> of the union's picketing, is a matter entirely apart from the determination of whether the Georgia court or the National Labor Relations Board should conduct the trial of the issue.
>
> The jurisdictional determination here is as final and reviewable as was the District Court's decision in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528.... * * * The judgment before us now, like the judgment in Cohen, falls 'in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate considerations be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.' Id., at 546, 69 S.Ct., at 1225." 371 U.S. at 548-549.

There is every reason to review this case now. If the parties were

required to go to trial, a permanent injunction were to issue, and the two stage appeals procedure were again to be exhausted in the New York courts, the jurisdictional and Constitutional issues will again have to be presented to this Court. In the meantime, issuance of the temporary injunction may have "... effectively dispose[d] of petitioner's rights and render[ed] entirely illusory his right to review here as well as his right to a hearing before the Labor Board." Id., at 371 U.S. 550. If the Petitioners were to prevail at trial upon grounds independent of the jurisdictional and Constitutional issues, a decision of New York's highest court which "... might seriously erode federal policy..." (Cox Broadcasting Corporation v. Cohn, supra at 420 U.S. 483) would be left standing.

These considerations apply equally to review of the Constitutional issues, as was done in Cox, and of the preemption issues, as was done in the Local 438 case. There is a present and urgent need for review which this Court has authority to grant.

II.

THE ACTIVITIES COMPLAINED OF ARE WITHIN THE EXCLUSIVE JURISDICTION OF THE NLRB.

It is an unfair labor practice under Section 8(b)(4) of the LMRA for a labor organization,

> "...(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, trans-

porting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person...."

The Court of Appeals concluded that,

> "The sole objective and consequence of the intended consumer boycott is by means of coercive economic pressure to force Barclay's to abandon its out-of-state suppliers and to turn exclusively to local sources." App.8e.

These facts, as found by the Court of Appeals, track precisely the statutory proscription upon coercion by a labor organization of a person engaged in commerce for the object of requiring him to cease using, selling, handling, transporting or otherwise dealing in the products of another producer, processor or manufacturer. They also parallel specific

allegations of the complaint.

Barclay's alleged in its complaint: (1) that it delivers products obtained from its out-of-state manufacturers to Pioneer Stores and Royal Farms supermarkets (R.49); (2) that the Petitioners caused "material" threatening "coercive economic action" to be sent to these supermarkets (R.49); and (3) that such action is threatened "...unless plaintiff's product is manufactured solely in New York." R.50.

Both the allegations of the complaint and the findings below state an unfair labor practice. It is academic, therefore, that the New York courts are preempted in favor of the exclusive jurisdiction of the NLRB. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

Further analysis of the complaint and of the proceedings below point to the reverse side of the preemption coin and to additional reasons for deferring to the jurisdiction of the NLRB. The second or "publicity other than picketing" proviso to Section 8(b)(4) protects

> "... publicity other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

Tree Fruits, supra, involved a consumer boycott, including picketing, of the products of a struck supplier. In its companion case, NLRB v. Servette, Inc., 377 U.S. 46 (1964), the Court held a consumer boycott, which did not involve picketing, directed, as here, toward a distributor to be protected under the above proviso (377 U.S. at 55-56). In the present case, the District Court cited Tree Fruits in finding no Section 303 jurisdiction because "... the complaint alleges only a consumer boycott...." App.1a-2a. The Appellate Division stated similarly that,

> "It is apparent that the defendant union attempts to avoid the consequences of an illegal secondary boycott by attempting to engage instead in a 'consumer boycott' only. In National Labor Relations Board v. Fruit and Vegetable Packers, 377 U.S. 58 (the so-called Tree Fruits case),

> the Supreme Court held tha peaceful picketing of retail stores urging consumers not to buy a specific product is not prohibited by the National Labor Relations Act." App.2c-3c.

Viewed from this perspective, it is at least arguable that the activities here involved are removed from the proscriptions of Section 8(b)(4) and are protected by the proviso. In either case, preemption would apply because, as stated in Garmon,

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244.

The analysis does not end here, and additional complexities inherent in this case underscore the wisdom of and necessity for deferral to the NLRB. The Court of Appeals assumed the existence of two factors, either of which could make the proviso inoperable. These are (1) that Local 757's statements as to Barclay's ice cream being manufactured under sub-standard labor conditions were "... without basis in the record" (App.4e); and (2) that there is no "issue" or "dispute" over union representation, wages or employment conditions as to the employees of Barclay's or the employees of its suppliers (App.8e).

NLRB precedent establishes that the proviso is inapplicable where statements as to sub-standard conditions are not supported; the challenged union activity remains prohibited under Section

Section 8(b)(4)(B). Cement Masons Union Local 337, 190 NLRB 261, 265-266 (1971), enforced sub nom. NLRB v. Cement Masons Local 337, 468 F.2d 1187 (9th Cir. 1972), cert. denied 411 U.S. 986 (1973). The second factor raises the additional question of whether the consumer boycott was for the purpose of publicizing a "primary dispute" with a producer as is required by a literal reading of the proviso. But see Bedding, Curtain and Drapery Workers Union v. N.L.R.B., 390 F.2d 495, 499-500 (2d Cir. 1968) cert. denied 392 U.S. 905 (1968).

The fact that Local 757's conduct was to include picketing (App.4e) raises the additional question under the proviso of whether it was to be in conformity to the permissible bounds of picketing established in Tree Fruits. See

NLRB v. Cement Masons Local 337, supra at 468 F.2d 1190-1191; Bedding, Curtain and Drapery Workers Union v. N.L.R.B., supra at 390 F.2d 502-503.

The three stage analysis thus required in the present case of initial coverage by the proscriptive language of Section 8(b)(4), coverage by the proviso, and possible exclusion from the proviso is a sophisticated venture into a complex statutory scheme. It is precisely this type of case which calls for deferral

> "... to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience...." San Diego Building Trades Council v. Garmon, supra, at 359 U.S. 242.

The potential for inconsistant local regulation inherent in the assertion

by the New York courts of jurisdiction in this multi-faceted dispute, contrary to the "unifying consideration" of the Court's preemption decisions (Ibid.), underscores the compelling need for review of the determination below.

III.

ASSUMING ARGUENDO THAT THE ACTIVITIES COMPLAINED OF ARE NEITHER PROTECTED NOR PROHIBITED BY FEDERAL STATUTE, THEY ARE NEVERTHELESS WITHIN AN AREA PREEMPTED BY CONGRESS AND NOT SUBJECT TO REGULATION BY STATE LAW.

If the New York courts were correct in their assertion that Garmon's deferral requirements are not applicable in this case, there would remain the critical question of whether they have attempted to regulate an area of conduct which Congress intended to be left

unregulated. Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, supra at 96 S.Ct. 2553; Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, supra at 377 U.S. 259-260. See San Diego Building Trades Council v. Garmon, supra at 359 U.S. 245-246; Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 474-475 (1955).

In Lodge 76 the Court stated that Garmon's doctrine of NLRB preemption was but one of two controlling preemption doctrines. Whereas Garmon applies to activities arguably subject to NLRB jurisdiction, preemption applies also to peaceful union secondary activities beyond the NLRB's jurisdiction. This second preemption doctrine

> "... came full bloom in... Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton [citation omitted],

> which held pre-empted the application of state law to award damages for peaceful union secondary picketing. Although Morton involved conduct neither 'protected nor prohibited' by §7 or §8 of the NLRA, we recognized the necessity of an inquiry whether '"Congress occupied the field and closed it to state regulation"'". 96 S.Ct. at 2556.

Morton reversed the grant of damages against a union for its persuasion of a customer to cease doing business with a struck employer. 377 U.S. 255, 259-260. In Lodge 76 the Wisconsin courts had enforced a state commission's injunction against a concerted refusal by a union and its members to work overtime after the NLRB's Regional Director had determined that this "... was not conduct cognizable by the Board...." 96 S.Ct. at 2550. This Court's adherence to Morton in overturning the injunction should have put

to rest any question which remained after Morton of the authority of the New York courts to enjoin a union's peaceful secondary activities.

The Court of Appeals, however, characterized Local 757's conduct as "'a merely peripheral concern of the Labor Management Relations Act' [so that] the jurisdiction of the State to regulate the activity in furtherance of local feeling and responsibility remains undiminished (Linn v. United Plant Guard Workers, 383 U.S. 53, 59) [1966]." App.7e. It based this conclusion upon findings that:

> "No legitimate objective of labor union activity is here involved. There is no questions of inter-union rivalry, nor of Barclay's handling non-union-made ice cream. There is no issue of union representation or dispute over wages or conditions of employment with respect to

either Barclay's employees or the employees of the Pennsylvania and Ohio manufacturers of the ice cream that Barclay's distributes." App.7e-8e.

It is clear at the outset that these findings are incorrect. Local 757's assertions as to the "sub-standard labor conditions" of Barclay's suppliers and their effects upon labor standards in New York City (R.41) and Barclay's denial (R.49, R.54) constitute a "dispute over wages or conditions of employment with respect to ... the employees of the Pennsylvania and Ohio manufacturers of the ice cream that Barclay's distributes" (App.8e). Bedding, Curtain and Drapery Workers Union v. N.L.R.B., supra. The fact that the New York courts may consider Local 757's position to be groundless does not render the dispute non-existent.

Even more important is the question raised by this conclusion of the states' authority to use Linn's limited exception to Garmon to avoid Morton's holding that peaceful secondary activities are not subject to state regulation.

In Lodge 76 the Court cited Linn as an example of cases which involve activity of "'... a merely peripheral concern of the Labor Management Relations Act'" (96 S.Ct. at 2551), stating that there "... we held that the availability of a state judicial remedy for malicious libel would not impinge upon the national labor policy." Id. at 2551 fn.3.*

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*Although Barclay's complaint alleged that Local 757's statements as to sub-standard labor conditions were "... deliberately false and libelous...." (R.54), this was not the basis for the decisions of the New York courts. The Court of Appeals found Local 757's conduct objectionable

(footnote cont'd.)

Linn involved a union's conduct directed toward an official of an employer with which it had a primary dispute. 383 U.S. at 55. Morton's proscription against state regulation of peaceful secondary activities was not in issue.

Morton dealt directly with peaceful secondary activities. The present case involves such activities. The Court of Appeals' characterization of them as matters of a merely peripheral concern to national labor policy is insupportable.

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as "... an unlawful restraint on trade under our State law and public policy [citation omitted]." App.5e. Of course, if the New York courts had relied upon the libel allegation and the State law of libel, Linn's applicability to conduct covered by Morton would be in issue and would deserve review. Compare Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974).

It has, contrary to national labor policy, applied local law to regulate an area occupied by Congress. Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, supra at 96 S.Ct. 2556. The decision below must be reviewed in order to preserve the uniformity of national labor policy.

IV.

THE INJUNCTION ISSUED BY THE NEW YORK COURT VIOLATES THE PETITIONERS' CONSTITUTIONAL RIGHTS.

Broad prohibitions against peaceful picketing and the dissemination of information by union members in industrial controversies violate the guarantees of the First Amendment. The Constitutional guarantees do not turn upon the nature of the dispute (Thornhill

v. State of Alabama, 310 U.S. 88 (1940)),* the existence of an employment relationship between the disputants or of a strike (American Federation of Labor v. Swing, 312 U.S. 321 (1941)), or whether a labor dispute exists as defined by state law (Bakery and Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 774 (1942)).

Although coercion, violence or "...continuing representations unquestionably false..." may be enjoined, broad leeway is given for

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* "There is no testimony indicating the nature of the dispute between the Union and the Preserving Company, or the course of events which led to the issuance of the strike order, or the nature of the efforts for conciliation." 310 U.S. at 94

"... loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies...." (Cafeteria Employees Union v. Angelos, 320 U.S. 293, 295 (1943)), and isolated abuses may not be relied upon to justify the future restraint of otherwise lawful activity (Id. at 295-296).

In Tree Fruits the Court found that the words "publicity, other than picketing" in the second proviso to Section 8(b)(4) did not support the NLRB's conclusion that "... the respondent unions violated this section when they limited their secondary picketing of retail stores to an appeal to the customers of the stores not to buy the products of certain firms against which one of the respondents was on strike." 377 U.S. at 59. This determination was based primarily upon an

analysis of the legislative history of Section 8(b)(4) in the light of a consistent congressional policy of refusing "... to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." Id. at 62.

> "Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." Id. at 63.

Against this background of Constitutional concern, the Court concluded that Congress authorized "... publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him.... (Id. at 70) and secondary "... consumer picketing...

employed only to persuade customers not to buy the struck product...."(Id. at 72), but barred "... picketing which persuades the customers of a secondary employer to stop all trading with him...." Id. at 71.

In the present case, the New York courts enjoined peaceful secondary handbilling as well as picketing directed only at the products distributed by Barclay's. That injunction brings into sharp focus the issue of whether a broad ban against peaceful picketing and publicity other than picketing collides with the guarantees of the First Amendment.

There is no doubt that Local 757's consumer boycott was designed to conform to Tree Fruits' permissible standards. The Appellate Division found

"... that the defendant union attempts to avoid the consequences of an illegal secondary boycott by attempting to engage in a 'consumer boycott' only. In National Labor Relations Board v. Fruit and Vegetable Packers, 377 U.S. 58 (the so-called Tree Fruits case), the Supreme Court held that peaceful picketing of retail stores urging consumers not to buy a specific product is not prohibited by the National Labor Relations Act." App.2c-3c.

The Court of Appeals stated that

> "... the Local made known its intention to conduct a consumer boycott by picketing retail stores where ice cream distributed by Barclay's was sold and by handing out literature urging consumers not to buy Barclay's products...." App.3e-4e.

The sample handbill prepared by Local 757 contained the following specific notice to the public:

> "SHOULD I PATRONIZE THIS MARKET? YES, AND PLEASE BUY ICE CREAM. WE ASK ONLY THAT YOU NOT BUY _____ BRAND." R.44.

Local 757's Notice to Store Managers and Employees advised: (1) that pickets would be placed at the store to try to persuade the public not to buy "... SCOTCH MAID ICE CREAM OR ANY OTHER BRAND COMING FROM A LOW COST AREA"; (2) that there would be no interference with the work of employees or with deliveries and pickups; and (3)that the pickets would be removed upon advice that the target products were not being sold at the store (R.41 - R.42).

The injunction issued below specifically enjoined distribution of the Notice to Store Managers and Employees (App.3d, ¶(a)) and of the handbill to the

public (Id., ¶(b)). It enjoined also picketing "... with the objective of dissuading consumers from buying ice cream..." distributed by Barclay's and manufactured by companies with Teamster contracts but not "... manufactured in New York or delivered by defendant Local's members." (App.3d-4d, ¶(c)). It enjoined statements to consumers that they should not buy ice cream manufactured outside New York or that they should not buy ice cream "... made under 'lower labor standards' or 'substandard conditions' or words of like import when they are informed by plaintiff the ice cream is manufactured by companies who have collective bargaining agreements with locals which are affiliated with the same parent union as is defendant local." App.4d-5d, ¶'s(d), (e).

Assuming arguendo, that the courts below correctly found that Local 757's statements as to sub-standard labor conditions are "... without basis in the record" (App.4e), and that this finding could, notwithstanding the leeway given "... loose language or undefined slogans ..." (Cafeteria Employees Union v. Angelos, supra at 320 U.S. 295), justify curbing such an "isolated evil" (Tree Fruits at 377 U.S. 71),* the New York courts went far beyond what would be required to accomplish this purpose.

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*Even this assumption cannot be supported. Barclay's did not allege and the courts below did not find that labor conditions at the Ohio and Pennsylvania manufacturing plants met the standards in manufacturing plants under contract to Local 757. Barclay's alleged only that the Ohio and Pennsylvania employees were "properly protected" by Teamster contracts. R.49 - R.50; see also R.33 - R.34, R.54

The injunction prohibits all consumer oriented picketing and publicity other than picketing directed at the products distributed by Barclay's. It prevents Local 757, in absolute terms, from taking its case to the public and violates the guarantees of the First Amendment. Cafeteria Employees Union v. Angelos, supra; Bakery and Pastry Drivers Local 802 v. Wohl, supra; American Federation of Labor v. Swing, supra.

It is clear, under Tree Fruits, that if Barclay's had elected to litigate its case before the NLRB, it could not have obtained the relief granted by the New York courts. Indeed, had it gone in the first instance to the State Supreme Court's division in New York City's Queens County rather than the

division in Manhattan, it could not have obtained the same relief. Such injunctions issued by the Supreme Court in Queens County have permitted picketing and publicity other than picketing while requiring only that such conduct conform to the Tree Fruits standards. M & H Fruit & Vegetable Corp. v. John Doe, 80 Misc.2d 1012, 364 N.Y.S.2d 413 (Sup.Ct. Queens Co. 1975).*

The permissible bounds of picketing and of publicity other than picketing now depend in New York solely upon a litigant's election whether to

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*Preemption was not involved in the M & H case because "... this litigation directly pertains to 'agricultural laborer(s)', who are excluded by the National Labor Relations Act from Federal control by the National Labor Relations Board...." 364 N.Y.S.2d at 417.

seek relief from the NLRB or a particular local court. The Court's concern, noted in Tree Fruits, for the Constitutional implications of broad bans upon peaceful picketing thus acquires new dimensions. To the extent Constitutional rights are involved, and they clearly are, they benefit and restrict all citizens - not just those who happen to be before a particular forum at any given time. If state courts are to be permitted to regulate peaceful consumer boycotts, the Constitutional determinations below must be reviewed to assure the equal protection of the laws.

CONCLUSION

For the above reasons, Petitioners urge that the Court issue a writ of certiorari to review the decision of the Court of Appeals of the State of New York.

Respectfully submitted,

STANLEY M. BERMAN
Attorney for Petitioners
605 Third Avenue
New York, New York 10016
Tel. No.: (212) 682-6077

Of Counsel:

COHEN, WEISS and SIMON

APPENDIX A

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 3656
(DBB)

BARCLAY'S ICE CREAM CO., LTD.,

Plaintiff,

-against-

LOCAL NO. 757 OF THE ICE CREAM DRIVERS AND EMPLOYEES UNION, Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and EMANUEL PARISH, Individually and as Secretary-Treasurer of said Local,

Defendants.

ENDORSEMENT

Defendants removed this action from the Supreme Court of the State of New York, New York County. Plaintiff moves to remand it to that Court. Since the complaint alleges only a consumer boycott, no federal jurisdiction is present. Beacon Moving and Storage, Inc. v. Local 814, 362 F.Supp. 442 (S.D.N.Y. 1972). See NLRB v. Fruit and Vegetable

Packers and Warehousemen, Local 760, 337 U.S. 58 (1964). Plaintiff's motion to remand is granted.

Settle order on notice.

DATED: New York, New York
September 10, 1975

/s/ Dudley B. Bonsal
U.S.D.J.

APPENDIX B

DECISION OF THE NEW YORK SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM, PART I

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM : PART I

Index No. 12502/75 Motion "A" of SEP 25 1975

BARCLAY'S ICE CREAM CO., LTD.,

Plaintiff,

-against-

LOCAL NO. 757 OF THE ICE CREAM DRIVERS AND EMPLOYEES UNION, Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and EMANUEL PARISH, Individually and as Secretary-Treasurer of said Local,

Defendants.

SAYPOL, J.:

Application by order to show cause for a preliminary injunction in this action to enjoin picketing and other concerted activity against the retail sale of the plaintiff's products is denied, but an immediate trial shall be ordered.

The defendant union threatens to organize, operate and encourage a consumer boycott of the plaintiff's product in supermarkets in New York City. The plaintiff's papers apparently show that the threatened boycott is based on two themes: that the plaintiff's products are manufactured under "substandard" labor conditions and that they are manufactured by workers outside New York City, perforce not members of the defendant local union, though claimed by the plaintiff to be members of other locals affiliated with the defendants' parent international. The plaintiff claims that its manufacturing workers are covered by union contracts, their conditions of employment and pay scales are not substandard and that what is at issue is not a labor dispute but an illegal attempt by the defendant to restrain the plaintiff

merely because its products are produced outside New York City by workers who are members of another union.

At the outset, the Court holds that the defendants' argument of preemption by Federal statute is ill-founded. Though based on another section of Federal law than that presented in argument to the U.S. District Court for the Southern District of New York, that Court's order remanding this action to this Court is now law of the case. The District Court's order of remand is inclusive of any section of Federal law which might have been (and for all this Court knows was) considered in ordering the remand. The defendants' remedy in this direction can only be in the forum which made that decision.

The issue whether this is a labor dispute against which this Court may not act or an illegal restraint of trade, under the common law or this State's Donnelly Anti-trust Act, involves questions of fact in sharp dispute on the papers before us and can be resolved only at a trial. Accordingly, an order shall be settled providing for an immediate trial.

Dated: October 6, 1975.

/s/ I.H.S.
J.S.C.

APPENDIX C

OPINION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Markewich, J.P., Murphy, Capozzoli, Lane, Nunez, JJ., 1588N

BARCLAY'S ICE CREAM CO., LTD.,

Plaintiff-Appellant, J. Goldberg

-against-

LOCAL NO. 757 OF THE ICE CREAM DRIVERS AND EMPLOYEES UNION, etc., et ano., etc.,

Defendants-Respondents. S.M. Berman

Order entered in the Supreme Court, New York County (Saypol, J.) on October 24, 1975 denying plaintiff's motion for a preliminary injunction reversed on the law and in the exercise of discretion, and the motion is granted without costs and without disbursements.

Plaintiff is a New Jersey corporation engaged in the wholesale distribution of ice cream to its customers in New Jersey and New York. It

obtains its product from manufacturers in Pennsylvania and Ohio. The defendant union, Local No. 757 of the Teamsters Union, represents employees engaged in the manufacture of ice cream in New York City. The employees of plaintiff's suppliers, as well as plaintiff's own employees, are all represented by local unions affiliated, like the defendant, with the Teamsters International Union. The defendant union wrote letters to a chain of retail food markets stating that it intended to peacefully picket outside their stores and distribute handbills urging consumers not to purchase plaintiff's ice cream because it was being manufactured under "sub-standard labor conditions", a term appearing several times in the handbill without any apparent basis in this record. It is apparent that the defendant union attempts to

avoid the consequences of an illegal secondary boycott by attempting to engage instead in a "consumer boycott" only. In National Labor Relations Board v. Fruit and Vegetable Packers, 377 U.S. 58 (the so-called Tree Fruits case), the Supreme Court held that peaceful picketing of retail stores urging consumers not to buy a specific product is not prohibited by the National Labor Relations Act.

The defendants removed the action to the Federal Court. However, the United States District Court for the Southern District of New York (Bonsal, J.) held that "since the complaint alleges only a consumer boycott, no federal jurisdiction is present" and returned the case to the State court. Contrary to their position when they removed the case to the Federal Court,

the defendants now urge that the activities complained of fall within the exclusive jurisdiction of the National Labor Relations Board, thereby divesting both the State and Federal courts of jurisdiction. We agree that if this were an unfair labor practice case or, if there was an arguable question of jurisdiction, determination in the first instance would have to be left to the National Labor Relations Board and we would be preempted of jurisdiction. Dooley v. Anton, 8 N.Y.2d 91 (1960); Columbia Broadcasting System v. McDonough, 8 A.D.2d 695 (1st Dept. 1959) aff'd. 6 N.Y.2d 962 (1959); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773 (1959). However, we find no labor dispute between these parties. The controversy involves no existing nor prospective agreement concerning employment, wages, hours or working conditions. There is no question concerning the

handling of non-union products nor of inter-union rivalry. This is not a labor dispute even under the broadest construction of that term.

Plaintiff alleges that the demand for ice cream in New York City is far greater than the manufacturing capability of its plants and that most of the ice cream supplied to New York City chains and cooperatives and delivered by defendants' drivers, is not only manufactured outside of New York but much of it is manufactured by non-union shops. The names of such customers are set forth in the record. Defendants not having denied these allegations, we deem them established for the purpose at least of deciding this appeal. The handbill to be distributed to the public by defendants' pickets is subscribed "Teamsters Wives Emergency Force" and "Ice Cream Drivers

and Employees Union Local 757". It reads in part:

> "Why are the Wives Picketing? We are the wives of the ice cream employees who have worked and fought for years to win decent wages and working conditions. The threat to our husbands' jobs and to the decent conditions in this community is so great that we must appeal to you, our neighbors and fellow consumers, for help."

We find no justification for these statements in this record. The purpose of defendants' activities which are sought to be enjoined is to deny plaintiff access to New York City supermarkets on a competitive basis, thus keeping away from the New York City market ice cream manufactured elsewhere. Such private embargo to prevent food from entering New York City is not a lawful objective. Mayer Bros. Poultry Farms v. Meltzer, 274 A.D. 169, 173 (1st Dept. 1948). Coercion by

subjecting a party to economic pressure causing injury to its business is clearly unlawful and may be enjoined by our courts. Goodwins, Inc. v. Hagedorn, 303 N.Y. 300, 305; Dorchy v. Kansas, 272 U.S. 306, 311. The information contained in the handbills to be distributed by the pickets is misleading as indicating that there is a labor dispute whereas none exists. As was said by this Court in Mayer Bros. Poultry Farms v. Meltzer, supra at p. 174:

> "Except under the police power, even the Legislatures of the States are not permitted to erect embargoes, which is a prerogative of the Congress alone, and even that is forbidden except against foreign trade (U.S. Const., art. I, §§ 8, 10). If the courts were to tolerate the erection of effective barriers of this sort by employers or employees whenever either shall think it to be to their economic interest to do so, what has been done in this case respecting poultry

could be done with regard to other kinds of food or merchandise. In the case of food-stuffs alone, the disastrous consequences of such embargoes need not be left to the imagination, in a community which is as dependent upon outside sources of supply as the city of New York. That is the interest of the consuming public in this issue. The law does not ignore these realities."

The respondent union, in its brief, concedes that there is no dispute as to the facts and that the only question is one of law. We agree.

All concur except Markewich, J.P., who dissents in the following memorandum:

If this is not a genuine labor dispute and defendants' activities bid fair to cause plaintiff irreparable harm, then I would agree that plaintiff is entitled to the injunction now granted

by the majority. If it is a legitimate labor dispute, no preliminary restraint should be imposed. The difficulty is that whether it is or is not such a dispute is not ascertainable from the papers, but only after the speedy trial ordered by Special Term. The injunction is granted prematurely. I would affirm.

Settle order on notice.

APPENDIX D

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

At a term of the
Appellate Division,
First Department held
in and for the County
of New York on the
5th day of February,
1976.

Present - Hon. Arthur Markewich,
Justice Presiding,
Francis T. Murphy, Jr.,
Louis J. Capozzoli,
Myles J. Lane,
Emilio Nunez,
Justices.

Index No.
12502/75

BARCLAY'S ICE CREAM CO., LTD.,

Plaintiff-Appellant,

-against-

LOCAL NO. 757 OF THE ICE CREAM
DRIVERS AND EMPLOYEES UNION,
etc., et ano., etc.,

Defendants-Respondents.

ORDER

An appeal having been taken to this Court from an order of the Supreme Court, New York County (Saypol, J.) entered on October 24, 1975, which denied

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Plaintiff-Appellant's motion for a preliminary injunction

and said appeal having regularly come on to be heard and said appeal having been argued by JAY GOLDBERG, ESQ. on behalf of Plaintiff-Appellant and STANLEY M. BERMAN, ESQ. of counsel to COHEN, WEISS AND SIMON, ESQS., for Defendant-Respondent and due deliberation having been had thereon and upon the memorandum decision of this Court filed herein from which a Justice dissented in a separate memorandum; it is

ORDERED, that the order entered in Supreme Court, New York County (Saypol, J.) on October 24, 1975 be and the same is hereby reversed on the law and in the exercise of discretion and the motion is granted without costs and disbursements and it is further

ORDERED, that the defendants, their agents, servants and employees, and all other persons acting in conjunction with them are hereby enjoined and restrained, pendente lite:

(a) from distributing to retail stores in New York the written material contained in the exhibit which is annexed to the complaint, or material of similar kind, content and description.

(b) from distributing to the public the written material contained in the exhibit which is annexed to the complaint, or material of similar kind, content and description.

(c) from picketing retail stores which are selling or which will sell ice cream distributed by plaintiff, which is obtained by plaintiff from manufacturers who have collective bargaining agreements

with locals affiliated with the same parent union as is defendant local with the objective of dissuading consumers from buying such ice cream unless it is manufactured in New York or delivered by defendant Local's members.

(d) from stating to customers of retail stores that sell ice cream delivered by plaintiff that they should not buy ice cream manufactured outside of New York.

(e) from stating to customers of retail stores that sell ice cream delivered by plaintiff that they should not buy ice cream made under "lower labor standards" or "substandard conditions" or words of like import when they are informed by plaintiff the ice cream is manufactured by companies who have collective bargaining agreements

with locals which are affiliated with the same parent union as is defendant local.

(f) from doing or causing to be done any other act designed to subject plaintiff to economic pressure to force it to distribute in New York only ice cream manufactured in New York, and

(g) from doing any act designed to mislead the public or retail stores that there exists a genuine labor dispute or grievance between the plaintiff and the defendants, and it is further

ORDERED, that the plaintiff-appellant shall post an undertaking in the amount of $500.00 dollars in the office of the New York County Clerk.

E N T E R

E.N.

APPENDIX E

DECISION OF THE NEW YORK COURT OF APPEALS

1 No. 31

BARCLAY'S ICE CREAM CO., LTD.,

Respondent,

vs.

LOCAL NO. 757 OF THE ICE CREAM DRIVERS AND EMPLOYEES UNION, etc., et al.,

Appellants.

(31) Stanley M. Berman, NY City, for appellant.
Jay Goldberg, NY City, for respondent.

JONES, J.:

We reject the proposition that under the doctrine of preemption our State courts must defer in this case to the exclusive competence of the National Labor Relations Board and thus are powerless to protect against the unlawful coercive activity designed by this union to erect an embargo on the flow of out-of-state goods into New York.

The Appellate Division reversed the order of Special Term (which had denied plaintiff's motion for a preliminary injunction) on the law and in the exercise of discretion, and restrained defendants pendente lite from picketing and distributing written material aimed at discouraging purchases of ice cream manufactured outside, and sold within, New York State by Barclay's. The case is before us on appeal from the nonfinal order of the Appellate Division by leave granted by that court on a certified question inquiring whether the order was properly made. In that posture it must be presumed that questions of fact--which defendants now contend exist -- were resolved in plaintiff's favor (CPLR 5612[b]). Our only inquiry is whether on the facts deemed to have been established the Appellate Division had power to grant the injunctive relief that it did; if

that power existed we do not inquire into the propriety of its exercise (Cohen & Karger, Powers of the New York Court of Appeals, Rev. Ed. p 378).

Barclay's is a New Jersey corporation engaged in the wholesale distribution of ice cream manufactured in Pennsylvania and Ohio to customers in New York and New Jersey. Local 757 represents employees engaged in the manufacture of ice cream in the New York City area. The employees of Barclay's suppliers, as well as Barclay's own employees, are represented by local unions affiliated with the same parent union as is Local 757. After the latter Local had been unsuccessful in calling on Barclay's to purchase all its ice cream from certain designated manufacturers within New York, the Local made known its intention to conduct a

consumer boycott by picketing retail stores where ice cream distributed by Barclay's was sold and by handing out literature urging consumers not to buy Barclay's products, which were described as having been manufactured outside New York "under sub-standard labor conditions" -- a description found by the Appellate Division to be without basis in the record. Labor conditions existing at the manufacturing plants which supplied the ice cream distributed by Barclay's were determined under collective bargaining agreements negotiated by the locals representing the employees at those plants. The sole objective of the Local 757 action as described by its Secretary-Treasurer was "to protect our members' jobs" -- i.e., by compelling Barclay's to purchase locally produced ice cream rather than that manufactured

in Pennsylvania and Ohio.

For present purposes, accepting the facts averred by Barclay's, as we must, it cannot be disputed that the Union's contemplated activities would constitute an unlawful restraint on trade under our State law and public policy (Mayer Bros. Poultry Farms v. Meltzer, 274 App Div 169). The remand to our State courts by the United States District Court for the Southern District of New York, following the Union's removal of this case to the Federal court, forecloses the contention that State court action is precluded because there is jurisdiction in the Federal courts. The critical question now is whether under the doctrine of preemption Barclay's must look for relief to the National Labor Relations Board.

We note that it does not suffice to negate such preemption merely to conclude that there is no "labor dispute" within the contemplation of section 807 of our State's Labor Law. The issue is whether the activity of the Local is "arguably" subject to the provisions of the Labor Management Relations Act, either by way of protection or prohibition (San Diego Building Trades Council v. Garmon, 359 US 236, 245; Dooley v. Anton, 8 NY2d 91). Manifestly, it is not enough that Local 757 itself asserts that its conduct in this case comes within the National Labor Relations Board ambit or that in other factually similar cases other litigants may have advanced corresponding assertions. The resolution must turn on whether it may rationally be concluded that the conduct in question is activity

conducted for the purpose and within the scope of recognized labor union objectives or whether it is conduct outside that scope although engaged in by the members of a labor union. If the activity is "a merely peripheral concern of the Labor Management Relations Act" the jurisdiction of the State to regulate the activity in furtherance of local feeling and responsibility remains undiminished (Linn v. United Plant Guard Workers, 383 US 53, 59).

Measured by these standards, we conclude that the consumer boycott planned by Local 757 in this instance falls outside the scope of the exclusive jurisdiction of the National Labor Relations Board. No legitimate objective of labor union activity is here involved. There is no question of inter-union rivalry, nor of Barclay's handling non-

union-made ice cream. There is no issue of union representation or dispute over wages or conditions of employment with respect to either Barclay's employees or the employees of the Pennsylvania and Ohio manufacturers of the ice cream that Barclay's distributes. The sole objective and consequence of the intended consumer boycott is by means of coercive economic pressure to force Barclay's to abandon its out-of-state suppliers and to turn exclusively to local sources. The imposition of such an embargo to promote the economic interest of members of the local union is an unlawful purpose contrary to the public policy of this State; as such it is not beyond the power of the courts to reach and to enjoin (cf. Linn v. United Plant Guard Workers, 383 US 53, 59, supra).

The narrow issue before us on this appeal is whether, as a matter of law, there was a legal barrier to the exercise by the Appellate Division of its authority to grant an injunction pendente lite. For the reasons stated we conclude that there is no such barrier.

Accordingly, the order of the Appellate Division should be affirmed. We interpret the certified question as an inquiry as to whether the Appellate Division had the power to make the order that it did (Cohen & Karger, Powers of the New York Court of Appeals, p 378, fn 92). So interpreted the certified question should be answered in the affirmative.

Order affirmed, with costs. Question certified answered in the affirmative. Opinion by Jones, J. All concur.

Decided February 10, 1977

APPENDIX F

ORDER OF THE NEW YORK COURT OF APPEALS DENYING PETITIONERS' MOTION FOR REARGUMENT

1 Mo. No. 305

BARCLAY'S ICE CREAM CO., LTD.,

Respondent,

vs.

LOCAL NO. 757 OF THE ICE CREAM DRIVERS and EMPLOYEES UNION, etc., et al.,

Appellants.

Motion for reargument denied.

DECISION COURT OF APPEALS
April 26, 1977

APPENDIX G

ORDER OF THE NEW YORK COURT OF APPEALS GRANTING PETITIONERS' MOTION TO AMEND THE REMITTITUR

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Ninth day of June A.D. 1977.

Present, Hon. Charles D. Breitel, Chief Judge, presiding.

1 Mo. No. 562

BARCLAY'S ICE CREAM CO., LTD.,

Respondent,

vs.

LOCAL NO. 757 OF THE ICE CREAM DRIVERS and EMPLOYEES UNION, &c., &ano. &c.,

Appellants.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion

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be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> On the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Whether the appellants' rights under the First Amendment to the Constitution of the United States were violated by the injunction pendente lite issued at the Appellate Division. The Court of Appeals considered that contention and found no such violation.

AND the Supreme Court of the State of New York, New York County, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

APPENDIX H

CONSTITUTION AND STATUTES

CONSTITUTIONAL PROVISIONS

The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

28 U.S.C. §1257(3), 62 Stat. 929, provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United

States."

Section 8(b)(4)(B) of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 141-142, 29 U.S.C. §158(b)(4)(B) provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents -

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative

of such employees whom such employer is required to recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;"